

MUNICIPAL DEBT AND TAX LIMITATIONS

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The limitations imposed upon municipal corporations within Ohio with respect to their ability to incur debt and to levy taxes stem from five separate constitutional provisions. Two of those provisions authorize the General Assembly to impose limitations by statute, the third imposes limitations and provides procedures for securing exceptions from the limitations, the fourth permits a municipal corporation to impose limitations upon itself, and the fifth requires the amortization of general debt which is issued.

The first two constitutional sections mentioned above are article XIII, § 6, and article XVIII, § 13. These sections provide as follows:

article XIII, § 6

The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

article XVIII, § 13

Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial conditions and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

The Ohio supreme court has held that the enactment of article XVIII, § 13, did not repeal article XIII, § 6, and that both are still effective.¹

The third relevant section is article XII, § 2; the first two sentences of that section contain the pertinent limitations. Those sentences read as follows:

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitations, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. . . .

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¹ The first portion of the one paragraph opinion in *Berry v. Columbus*, 104 Ohio St. 607, 136 N.E. 824 (1922) clearly states the proposition as follows:

It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby, reversed, and the judgment of the common pleas court is hereby affirmed, for the reason that Section 6, Article XIII of the Ohio Constitution, was not repealed by the adoption of Section 13, Article XVIII, or of any other home rule provisions in said article

Id. at 607, 136 N.E. at 824. This rule has been followed as late as March 31, 1971, in *State ex rel. Cronin v. Wald*, 26 Ohio St. 2d 22, 268 N.E.2d 581 (1971).

The fourth section is article XVIII, § 7 which reads as follows:

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

The fifth section is article XII, § 11, which requires levy of a tax for amortization of general debt:

No bonded indebtedness of the state, or any political sub-divisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

As indicated by article XVIII, § 7, a municipal corporation in Ohio is in an entirely different legal position from municipal corporations in most other states. In 1912, the electorate of this state adopted article XVIII of the Ohio Constitution which provided Ohio municipal corporations with a broad grant of powers for local self-government. The key section of article XVIII with respect to that power is § 3, which reads:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Under this broad grant, the Ohio supreme court has held that municipal corporations have the power to incur debt,² levy taxes,³ borrow money,⁴

² *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 100 N.E.2d 225 (1951). The court not only found the power to incur debt but also pointed out that an implementing statute is not necessary:

It is our conclusion that the City of Columbus, having no provision in its charter prohibiting the acts proposed in this ordinance, has the power directly under the Constitution of Ohio to pass the ordinance, carry out its terms, and issue revenue bonds as provided therein. Its power in the premises is not derived from Sections 3939-2 and 3939-3, General Code

. . . .

The City has the power to pass, carry out, and enforce the ordinance in question irrespective of Sections 3939-2 and 3939-3, General Code. We do not, however, find that those sections of the General Code are in contravention of the Constitution but merely that they are unnecessary for the accomplishment of the project under consideration

Id. at 98-9, 100 N.E.2d at 233-34.

³ *Angell v. Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950). The court not only recognized the power of a municipal corporation to levy an income tax, but also the ability of the General Assembly to impose limitations or pre-empt the field under article XIII, § 6, and article XVIII, § 13, of the Ohio constitution:

In the home-rule amendment to the Ohio Constitution (Article XVIII) the sovereignty of the state was so limited as to confer certain sovereignty upon municipalities, *viz.*, Sections 3 and 7 of Article XVIII.

Section 3 of Article XVIII provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other simi-

issue bonds supported by the revenues of the facilities financed therefrom,⁵ and issue bonds secured by mortgaging the facilities acquired with the moneys borrowed and pledging the revenues not only of those facilities, but of related existing facilities,⁶ without the necessity of finding authority in the statutes of Ohio.

I. GENERAL AND SPECIAL DEBT

In order to understand what is meant by the term debt as used in Ohio, it is necessary to consider two types of debt, general and special. General debt consists of that debt for which the municipality has pledged its general credit and is payable from *ad valorem* taxes and other available sources. In Ohio, the forms of authorized general obligation debt are generally called bonds or notes, although some county general debt issued for sewer or water improvements is sometimes denominated as certificates of indebtedness.⁷ Because of the provisions of the aforesaid article XIII, § 6, and article XVIII, § 13, general debt must be authorized by and incurred in the manner provided by the statutes of Ohio.⁸

Special debt is so-called because only special sources of revenue are pledged for the payment of the principal of and interest on the special

lar regulations, as are not in conflict with general laws."

Section 7 of Article XVIII provides:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this Article, exercise thereunder all powers of local self-government."

A fundamental power of government is the power to raise revenue . . .

. . . .

Therefore, until the General Assembly of Ohio has pre-empted the income tax field, a municipality, subject to such limitation as may be imposed by the General Assembly under Section 13 of Article XVIII or Section 6 of Article XIII of the Ohio Constitution, may levy and collect an income tax. So that today, in the absence of legislation by the General Assembly providing for a uniform or graduated income tax and the required apportionment thereof and subject to Section 13 of Article XVIII and Section 6 of Article XIII limiting the power of taxation, Ohio municipalities have the power to levy and collect an income tax.

Id. at 182-84, 91 N.E.2d at 252-53.

⁴ *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N.E.2d 778 (1953); *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 100 N.E.2d 225 (1951).

⁵ *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 100 N.E.2d 225 (1951).

⁶ *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952). The supreme court found that the relationship between on-street and off-street parking facilities was sufficient to support a pledge of on-street parking meter revenues to pay principal of and interest on revenue bonds issued to finance an off-street parking garage:

[W]here such bonds are payable solely from facilities purchased by the proceeds thereof and revenues derived from the operation of those facilities and of other facilities of the municipality devoted to the same general public municipal purpose as the facilities so purchased, and where such revenues are not derived from payments by the municipality, such bonds do not constitute a debt of such municipality.

Id. at 129-30, 107 N.E. at 207. This case cited with approval in *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972).

⁷ OHIO REV. CODE ANN. §§ 6103.08 and 6117.08 (Page 1954).

⁸ *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972).

debt. In some states this type of debt is referred to as limited debt, but in Ohio the term is not generally used because of the danger of confusion with general debt issued within the ten mill limitation of the aforesaid article XII, § 2, without a vote of the electorate (so called "councilmanic" bonds or notes). The forms of special debt are mortgage revenue utility bonds issued under authority of article XVIII, § 12, of the Ohio Constitution, home rule revenue bonds or notes issued under authority of article XVIII, § 3, and hospital improvement revenue bonds issued pursuant to § 140.06 of the Ohio Revised Code. The holder of a special debt obligation does not have a claim against the general assets and general credit of the municipal corporation, but must look solely to the special source of moneys pledged for the payment of principal of and interest on the debt. Special sources for payment of principal and interest include revenues such as those received from water, sewer or electric utility operations, parking meters, off-street parking lots, garbage and refuse disposal, recreational facilities or hospitals. The source of the revenues pledged for payment of principal and interest of special debt must have a distinctive relationship to the facilities to be financed from the special debt. This prevents the special debt from being converted into general debt, which would be illegal because not incurred in the manner prescribed by law.⁹ For instance, the Ohio supreme court has held that in issuing special debt to finance construction of an off-street parking garage, the pledge of the revenues derived from the meters located on dedicated streets to payment of the principal of and interest on such special debt is proper, because of the close relationship between parking motor vehicles on the street and parking them off the street.¹⁰ On the other hand, the court has not permitted the allocation of non-tax moneys to support special debt when the funds so diverted were replenished from general tax moneys. The court there held that the special debt in fact constituted general debt because of the indirect use of the general tax moneys to make available moneys to pay principal and interest.¹¹

⁹ *Kasch v. Miller*, 104 Ohio St. 281, 135 N.E. 813 (1922); *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952); *State ex rel. Public Institutional Bldg. Authority v. Griffith*, 135 Ohio St. 604, 22 N.E.2d 200 (1939). See also note 6 *supra*. There are no reported Ohio decisions other than *Gordon* which have determined that two sources of revenue are "devoted to the same general public municipal purpose" as the facilities financed from the proceeds of revenue bonds.

¹⁰ *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952).

¹¹ *State ex rel. Public Institutional Bldg. Authority v. Neffner*, 137 Ohio St. 390, 399, 30 N.E.2d 705, 709 (1940) (per curiam) wherein the Court held:

Where substantial funds which have heretofore gone into the general funds of the state treasury are pledged to liquidate such bonds, thereby requiring the state to seek and secure revenues otherwise in order to meet its obligations to care for and support its wards, then the obligation of those bonds does become the ultimate obligation of the state

II. DEBT LIMITATIONS

For municipal corporations in Ohio, there are two types of general debt limitations. The first is a direct debt limitation imposed by § 133.03 of the Ohio Revised Code. The other is an indirect debt limitation imposed by article XII, § 2, referred to above. Direct debt limitation is so-called because it establishes a ceiling on the aggregate principal amount of non-exempt general indebtedness that a municipal corporation may have outstanding at any time. The latter imposes an indirect limitation on the aggregate principal amount of general indebtedness that a municipal corporation may have outstanding without a vote of the electorate, by imposing a ceiling on the number of dollars that may be raised in any year to pay principal of and interest on unvoted general indebtedness thereby limiting the aggregate amount of unvoted general debt that may be outstanding.

A. *The Statutory Direct Debt Limitation*

The General Assembly (pursuant to article XIII, § 6, and article XVIII, § 13) enacted Chapter 133 of the Ohio Revised Code, commonly referred to as the Uniform Bond Law, which provided the procedure to be followed in the issuance of general debt. This chapter was originally enacted as the Uniform Bond Act of 1927 and covers not only municipal corporations, but also counties, boards of education, townships and certain other political entities authorized to incur general debt. The Uniform Bond Law not only establishes direct debt limitations applicable to the various subdivisions, but also prescribes the procedure to be followed in the authorization and issuance of bonds and bond anticipation notes.

The current debt limitations found in the Uniform Bond Law for Ohio municipal corporations are for non-exempt general obligation debt, and provide that the aggregate net amount of such debt outstanding at any time may not exceed ten and one-half percent of the then assessed valuation of the municipal corporation.¹² The ten and one-half percent limitation is applicable to non-exempt general debt whether it was issued with or without a vote of the electorate. Within the ten and one-half percent limitation there is a further limitation imposed on the net amount of non-exempt general debt issued without a vote of the electorate.¹³ This limitation is four percent of the then assessed valuation of municipal corporations, except in the case of a city which has adopted a charter for its government and included in that charter a charter tax rate limitation (either an overall limitation or one on current expenses of the municipal

¹² OHIO REV. CODE ANN. § 133.03 (Page 1969).

¹³ *Id.*

corporation), in which event the limitation is five and one-half percent of the then assessed valuation of that city.¹⁴ This increased limitation on unvoted general debt is not applicable to villages. In order to apply these limitations, it is essential to keep in mind the necessity of calculating the amount of net non-exempt general debt against the then actual assessed valuation of the subdivision at the very time the debt is incurred.¹⁵ The exception to this rule is in the case of non-exempt voted general obligation debt, in which case the debt limitation percentage (in effect on the date such debt was authorized by the electorate) is the limitation against which the issuance of the debt must be tested.¹⁶

The amount of the non-exempt debt must be determined in order to know whether proposed additional general debt would result in the applicable limitations being exceeded. To determine non-exempt debt the gross debt of the municipal corporation must be reduced first by the amount of special debt outstanding, and then by the kinds of general debt bonds and notes enumerated in applicable sections of the Uniform Bond Law and in other sections of the Ohio Revised Code as being exempt from the limitations contained in § 133.03. Many of the types of debt listed as exempt in various sections are either infrequently issued, no longer outstanding, or outstanding in such small amounts as not to be of general interest. The more important types of exempt general debt are the following:

(1) Bonds and notes issued in anticipation of the levy or collection of special assessments (either in original or refunded form).¹⁷

(2) Notes issued in anticipation of the collection of current revenues or in anticipation of the proceeds of a voted tax levy.¹⁸

(3) Notes issued for emergency purposes under Section 133.29 of the Ohio Revised Code.¹⁹

(4) Bonds or notes issued to pay final judgments.²⁰

(5) Bonds or notes issued for the purpose of purchasing, constructing, improving or extending water systems, sewage disposal plants or sewerage systems, or municipally owned airports, landing fields, and rapid transit systems, off-street parking lots and buildings, buildings for the care or treatment of the sick or infirm and improvements for garbage and refuse collection or disposal or either, to the extent that the income from such utility, buildings or all off-street parking facilities and structures or all garbage and refuse disposal improvements and services is sufficient to cover

¹⁴ *Id.*

¹⁵ OHIO REV. CODE ANN. § 133.02 (Page 1969).

¹⁶ State *ex rel.* Cribbet v. Ziegler, 172 Ohio St. 32, 173 N.E.2d 103 (1961); Kurtz v. Columbus, 137 Ohio St. 184, 28 N.E.2d 587 (1940).

¹⁷ OHIO REV. CODE ANN. §§ 133.02, 133.31, 133.31.1 and 133.32 (Page 1969).

¹⁸ OHIO REV. CODE ANN. §§ 133.02, 133.30, 5705.19 and 5705.19.1 (Page 1969).

¹⁹ OHIO REV. CODE ANN. § 133.02 (Page 1969).

²⁰ OHIO REV. CODE ANN. §§ 133.02 and 133.27 (Page 1969).

the cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for retirement or sinking fund to retire such bonds as they become due.²¹

(6) Federal aid bonds and notes issued under Chapter 139 of the Ohio Revised Code.

(7) Voted bonds issued for the purposes of urban redevelopment to the extent that such bonds do not exceed 2% of the total value of all property in the municipal corporation as listed and assessed for taxation.²²

(8) Bonds issued for the purpose of purchasing, constructing, improving or enlarging municipal university residence halls pursuant to Section 133.031 of the Ohio Revised Code.²³

(9) Bonds for the purpose of purchasing, constructing, improving, or enlarging municipal recreational facilities pursuant to Section 133.032 of the Ohio Revised Code.²⁴

(10) Voting machine notes and vote tabulating equipment notes issued pursuant to Sections 3507.02 and 3506.03 of the Ohio Revised Code, respectively.²⁵

To determine whether the indebtedness of a particular municipality would exceed the aforesaid limitations, one further mathematical calculation must be made. From the aggregate amount of general non-exempt debt, there must be deducted the amount of money held in the Bond Retirement Fund available for the principal payment of general debt bonds and notes not excluded in determining non-exempt debt.²⁶ Neither moneys in the Bond Retirement Fund accumulated therein for payment of interest nor moneys accumulated for payment of the principal of general debt issued pursuant to vote of the electorate may be deducted in determining compliance with the above described unvoted four or five and one-half percent debt limitation.

B. *The Constitutional Indirect Debt Limitation*

The second kind of debt limitation applies to all unvoted general debt, regardless of its status with respect to the statutory general debt limitations, whether or not exempt in the calculation of non-exempt debt, and whether or not the payment of the principal thereof and the interest thereon is ex-

²¹ OHIO REV. CODE ANN. § 133.03(D) (Page 1969).

²² OHIO REV. CODE ANN. § 133.03(H) (Page 1969).

²³ OHIO REV. CODE ANN. § 133.031 (Page 1969). The exemption only applied to the extent that the revenues of the university, exclusive of taxes, are sufficient to pay all operating expenses, principal, and interest as they become due.

²⁴ OHIO REV. CODE ANN. § 133.03.2 (Page Supp. 1972). The exemption only applies to the extent that the revenues of the recreational facilities, exclusive of taxes, are sufficient to pay all operating expenses, principal, and interest as they become due.

²⁵ These notes are exempted not only from the direct debt limitations but also from all other limitations imposed by OHIO REV. CODE ANN. §§ 133.01-.65 (Page 1969).

²⁶ OHIO REV. CODE ANN. § 133.02 (Page 1969).

pected to come from special assessments, utility earnings or other non-tax sources. This constitutional provision is self-implementing and no action of the General Assembly is required to make this limitation effective.

This constitutional indirect debt limitation is contained in the portion of article XII, § 2, which states that

[n]o property . . . shall be so taxed in excess of one percent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation²⁷

This prohibition is the now so-called ten mill limitation. The above quoted language prohibits the amount of *ad valorem* taxes levied on a particular piece of property by the state of Ohio and by all overlapping political subdivisions (the county, municipal corporation, board of education and township) from exceeding ten mills, unless such excess is authorized by a vote of the electorate, which may be in the form of voted tax levies, voted bond issues, or approved charter tax rate limitations with a higher percentage. The statutes of Ohio do not provide for an *ad valorem* tax to be levied by the state and, therefore, further discussion will be limited to municipal corporations and other political subdivisions. Article XII, § 2, must be read in conjunction with article XII, § 11, requiring that no bonded indebtedness of the state or any political subdivision thereof may be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision has been made for the levying and collecting annually of a tax sufficient in amount to pay the interest on such indebtedness, and to provide a sinking fund for its redemption at maturity. It is the interaction of these two sections that makes effective the ten mill limitation upon the unvoted general debt of the political subdivisions of the state. In order for the municipal corporation to issue general debt, article XII, § 11, requires that a tax be levied to pay the principal of and interest on that debt. Article XII, § 2, requires that if the debt is unvoted, the millage required to pay the principal of and interest on the debt, together with that millage required to pay principal of and interest on all prior outstanding unvoted general debt (of both the municipal corporation and all other overlapping political subdivisions), cannot require the levy in any year on any property within the municipal corporation of taxes exceeding ten mills per dollar of valuation.²⁸

In determining the application of the ten mill limitation, the minimum levy apportioned to the municipal corporation from the total ten mills allocated to all overlapping political subdivisions under § 5705.31 of the

²⁷ OHIO CONST. art. XII, § 2.

²⁸ State *ex rel.* Kitchen v. Christman, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972).

Ohio Revised Code is not used. Rather, the full ten mills less only the number of mills required for unvoted general debt already outstanding is used, whether issued by the municipal corporation or by political subdivisions overlapping the municipal corporations. For example, if five mills are required for principal of and interest on unvoted general debt already outstanding, a political subdivision under this rule may authorize and issue an amount of unvoted general debt which will require not more than five mills for the payment of principal and interest in the highest year on the proposed indebtedness. The effect of this arrangement is that a political subdivision cannot husband its share of the ten mill limitation for application to future unvoted general indebtedness. Instead, the political subdivision which first issues its unvoted general debt has allocated to it the quantity of millage necessary to provide payment of principal and interest. The practical effect is not a harsh one for the municipal corporations. The one-tenth of one percent of assessed valuation unvoted debt limitation of boards of educations,²⁹ the inability of townships to incur unvoted general debt except in anticipation of special assessments for roads or sidewalks³⁰ and for fire and road equipment,³¹ and the large assessed valuations of counties have generally left the bulk of the ten mill limitation available to municipal corporations.

Attempts have been made to circumvent the ten mill limitation. As stated above, the Ohio supreme court has held that just because that special assessments had been levied and were expected to pay the principal of and interest on indebtedness, this did not prohibit the possibility of a tax being levied based upon a calculation of the ten mill limitation.³² The Supreme Court of Ohio has recently invalidated an attempt to avoid both the direct debt limitation and the ten mill limitation by a city which entered into a lease-purchase arrangement in order to acquire a capital improvement.³³ The court held that the arrangement was invalid because

²⁹ OHIO REV. CODE ANN. § 133.04 (Page 1969).

³⁰ OHIO REV. CODE ANN. § 133.07 (Page 1969).

³¹ OHIO REV. CODE ANN. §§ 505.37 and 5549.02 (Page 1953; 1970).

³² *State ex rel. Portsmouth v. Kountz*, 129 Ohio St. 272, 194 N.E. 869 (1935). Judge Day in the opinion concurred in by six judges stated the situation very well:

We now come to the question whether, in computing the number of mills already pledged, it is necessary to take into consideration the number of mills required to service outstanding special assessment bonds and other unvoted general obligation bonds which are in practice serviced from sources of revenue other than general taxation.

We answer in the affirmative. We are here concerned with questions of right and not with questions of practice. Even though outstanding special assessment bonds and unvoted general obligation bonds are in practice serviced from sources of revenue other than taxation, they are obligations of the municipality nevertheless. If for any reason such bonds can no longer be serviced from such outside sources of revenue, the municipality has a clear legal right to resort to the method of collecting revenue from taxation in order to meet the payments due on such obligations. A municipality has such right, regardless of the fact whether it be used or not.

Id. at 277-78, 194 N.E. at 872.

³³ In *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 77, 285 N.E.2d 362, 370 (1972), the court concluded:

the lease-purchase constituted a debt and no tax had been levied to pay the principal thereof and interest thereon as required by article XII, § 11.

In conclusion, the ability to incur unvoted general debt is a function of the interest rate, the number of annual installments for principal, and the amount of *ad valorem* tax moneys produced by the tax imposed; that is, as the interest rate becomes lower, the annual principal installments are spread over a greater number of years and the valuation on which millage is to be imposed increases, thus the borrowing power becomes greater.

C. Other Indirect Debt Inhibitions

The case law in Ohio requires that debt be issued only for a proper municipal public purpose. Municipal corporations have been granted home rule power in article XVIII, § 3, but the uncertainty caused by a lack of specificity has sent municipal corporations to the General Assembly from time to time to get a statutory provision which denominates a specific municipal undertaking as a proper public purpose. In some instances, the enactment of the particular statutory provision has been accompanied by other unwelcome provisions.³⁴

There is also a further indirect inhibition imposed by article VIII, § 6, which prevents a municipal corporation from lending its assistance to private corporations. Over the years this section and a companion section applicable to Ohio (article VIII, § 4), have had numerous interpretations by the Ohio supreme court. The court has held that the operation of electric utility facilities of a municipal corporation, in a manner such that they cannot be operated independently of property owned by a private corporation³⁵ making it possible for a private corporation to borrow

This court cannot make constitutional limitations meaningless by judicial circumvention in order to assist the city in acquiring a needed recreational facility. Nor does this court pass upon the desirability of such a constitutional debt limitation. The court must apply the applicable constitutional provision, including the purpose for which it was created, as the court finds it. The court cannot close its eyes to the fact that the lease arrangement is nothing more than an installment purchase plan by the city to acquire a recreational facility, binding the city and its taxpayers irrevocably to a program of successive appropriations for a period of ten years. Without a vote of the people, this is exactly what Section 11 of Article XII was designed to prevent. If today this provision is deemed unwise, the remedy is a constitutional amendment.

³⁴ OHIO REV. CODE ANN. § 717.05 (Page 1954) authorizes municipal corporations to acquire, construct, improve and own off-street parking facilities. The last sentence of the section makes the property of the municipal corporation subject to *ad valorem* taxation. See also *Columbus v. County of Franklin*, 167 Ohio St. 256, 147 N.E.2d 625 (1958); *Cincinnati v. Bowers*, 176 Ohio St. 110, 198 N.E.2d 78 (1964).

³⁵ *Alter v. Cincinnati*, 56 Ohio St. 47, 46 N.E. 69 (1897) wherein the first two syllabi state:

1. Under section six of article eight of the constitution, a city is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute one property.

2. A city must be the sole proprietor of property in which it invests its public

money at a lower interest rate,³⁶ constituted assistance to private corporations, in violation of these provisions. However, the court has ruled that the lending of credit and assistance by one political subdivision to another does not violate article VIII, § 6. The decisions have approved mutual assistance; that is, the larger political subdivisions, such as a county, lending its credit to a municipal corporation,³⁷ and a municipal corporation lending its credit to a county.³⁸

D. *The Debt Limitations Applicable to Chartered Municipal Corporations*

The direct debt limitation on unvoted non-exempt general debt for municipal corporations may be exceeded up to a maximum of five and one-half percent in the case of charter cities (not villages) whose charters provide for "the levying of taxes outside the ten mill limitation without a vote of the electors."³⁹

It should be noted that such a charter provision is authorized by article XII, § 2, of the Ohio constitution which imposes the ten mill limitation. That section authorizes enactment of laws to provide for exceeding the ten mill limitation without a vote of the electors when approved by at least a majority of the electors of the taxing district voting on the question, or when the charter of the municipal corporation has a provision

funds, and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property.

Id. at 47, 46 N.E. at 69. *Accord*, *Brewster v. Hill*, 128 Ohio St. 343, 190 N.E. 766 (1934). *See also State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959) where the third syllabus reads:

Under Section 6, Article VIII of the Constitution of Ohio, a municipality is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and a municipality is thereby prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property.

16 Ohio St. at 457-58, 159 N.E.2d at 742.

³⁶ *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 197 N.E.2d 328 (1964). The opinion in this case includes a definition of lending credit:

It is apparent, therefore, that, as to each proposed borrower, its "ability to borrow" or borrowing power (i.e., credit) is not sufficient to enable it to borrow the money which the commission proposes to loan to such borrower on terms as advantageous as the terms which the commission proposes to provide. In effect, therefore, each such borrower will be receiving more credit (or borrowing power) because of the commission's loan to it than it could otherwise get from any financial institution. At least to that extent, the commission is giving or loaning "credit *** to, or in aid of" that borrower.

Id. at 47-48, 197 N.E.2d at 330-31.

³⁷ *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955), wherein the county proposed to construct and own a subway in downtown Cleveland. The county did not operate a transit system and proposed to lease the subway to the city of Cleveland which would use the subway for its transit system. The amount of rental payment was to be subsequently determined.

³⁸ *See Bazell v. Cincinnati*, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968) wherein the county proposed to construct and own a new stadium which it had agreed to lease to the city of Cincinnati for an amount sufficient to pay the principal of and interest on the revenue bonds issued to finance construction of the stadium.

³⁹ OHIO REV. CODE ANN. § 133.03 (Page 1969).

stating that such ten mill limitation may be exceeded. In furtherance of these provisions, § 5705.18 of the Ohio Revised Code provides that the ten mill limitation does not apply to tax levies of any municipality which by its charter provides for limitation of the total tax rate which may be levied without a vote of the electorate for all purposes or for current operating expenses. If the limitation imposed by the charter is for all purposes, an overall tax rate limit, then it is substituted for the ten mill limitation of article XII, § 2. If the limitation is only for current expenses, then the ten mill limitation remains in effect as to unvoted general debt. Therefore, the five and one-half percent non-exempt debt limitation on unvoted general debt contained in § 133.03 does not have any relationship to the amount of taxes which may be levied without a vote of the people by a charter city. All that is necessary to have such additional borrowing power is that the city have in its charter a provision for the levy of taxes outside of the ten mill limitation without a vote of the electors. But, unless the charter tax rate limitation provides additional moneys to pay the principal of and interest on general debt, this increased borrowing power may not be of any real benefit to a city. If the charter tax rate limitation is structured to produce the same amount of taxes, then it is improbable that the additional borrowing power is of use to the municipal corporation, except when financing the initial stages of a self-supporting program, such as a water or sewer system, which ultimately can be permanently financed by bonds with the principal thereof and interest thereon provided from earnings, rather than from the city's limited taxes. Consideration of the individual charter is necessary to determine each charter city's indirect debt limitation. In these circumstances the charter city's tax rate limitation may operate in the same manner as the constitutional tax rate limitation and thus impose an indirect debt limitation.

III. LIMITATIONS ON TAXING POWER OF MUNICIPAL CORPORATIONS

Turning to the limits imposed by the Ohio constitution upon taxation by municipal corporations, an initial problem is a determination of just what is taxation. The limitations on taxation by municipal corporations in Ohio have their constitutional source in the same sections as previously discussed in connection with debt limitations which include article XII, § 2, article XIII, § 6 and article XVIII, § 13. The effect of the last two sections is to provide the General Assembly with ultimate authority in this field.

Ohio has a property (*ad valorem*) tax which is imposed upon three classifications of property. The first is real property, which also includes structures affixed to the real property, that is, fixtures. The second is personal tangible property, and the last is public utility property.⁴⁰ The to-

⁴⁰ OHIO REV. CODE ANN. §§ 5711.03, 5713.01, 5727.06 and 5705.49 (Page 1954).

tal valuation of these three categories combined constitutes the assessed valuation of a municipal corporation.

Under the authority of article XVIII, § 13, and article XIII, § 6, the General Assembly has adopted a budget procedure which is set forth in Chapter 5705 of the Ohio Revised Code and which includes the procedure for levying the *ad valorem* tax. Such budget must include anticipated revenues and expenditures from sources other than *ad valorem* taxes. Under this procedure, the General Assembly has provided that the ten mill unvoted tax that is available to all of the overlapping political subdivisions shall be divided among those overlapping subdivisions. Each subdivision is allocated two-thirds of the taxes levied without a vote of the people by that subdivision during the five years that the fifteen mill constitutional limitation was in effect from 1928 to 1932, inclusive. The ten mills are thus split on a historical basis which may have absolutely no relevance to the varying needs of the political subdivisions today. Also, many of today's municipal corporations were not in existence between 1928 and 1932. If a new municipal corporation has been able to eliminate the township by either incorporating the entire township or creating a township coterminous with the municipal corporation,⁴¹ such municipal corporation may receive the township's portion of that mandated share. However, the scope of services of a township is not as broad as that of a municipal corporation and generally the township's mandated share of the ten mills is not as large as required for a municipal corporation.

Again, the ten mill limitation may make it difficult for a municipal corporation to annex territory because of the effect upon its share of the ten mills. In Ohio, the boundaries of municipal corporations and school districts are not coterminous, but article XII, § 2, of the Ohio Constitution does require taxation at a uniform rate. Thus annexation by a municipal corporation may provide a new overlapping subdivision in the form of a school district formerly not within the boundaries of the municipal corporation. If the mandated share of the ten mill limitation for the new overlapping school district is greater than the mandated share of the old overlapping school district, then the municipal corporation will suffer a reduction of revenues. Section 5705.311 of the Ohio Revised Code limits the reduction to the territory within the new overlapping school district. This problem does not exist if the annexing municipal corporation has a charter rate limitation, since that limitation places the municipal corporation's taxes outside the ten mill limitation.

⁴¹ OHIO REV. CODE ANN. § 503.07 (Page Supp. 1972). This section states that the county commissioners "shall" create a coterminous township at the request of a city and "may" create such a township at the request of a village.

IV. OTHER TAXES

Any consideration of the limitations on the taxing power of municipal corporations must consider the pre-emption doctrine. The power of an Ohio municipal corporation to levy taxes flows from the home rule power derived from article XVIII, § 3, of the Ohio Constitution. The Ohio supreme court has upheld the ability of an Ohio municipal corporation to levy taxes on certain income,⁴² but it has struck down attempts to impose taxes on other subject matters which it felt were the subject of taxation by the state⁴³ on the ground that the state had pre-empted the particular field of taxation. The General Assembly evidenced its concern for this doctrine when, in enacting a state income tax, it specifically denied any intent of pre-empting the existing municipal income taxes.⁴⁴ Thus, any new tax to be levied by the municipal corporation must avoid the pre-emption doctrine evolved by the Ohio supreme court.

The ability of an Ohio municipal corporation to levy an income tax has been limited by the General Assembly pursuant to article XIII, § 6, and article XVIII, § 13, so as to require the submission to the electors of any question of the imposition of an income tax in excess of one percent. The statutory procedure is not flexible and can present difficulties when there is also a charter provision which requires submission to the electors of the question of imposition of an income tax in excess of one percent.

The definition of what constitutes a tax has been expanded by the Ohio supreme court so that when a municipal corporation is in the utility business and earns substantial excess earnings from one of the utilities that it is operating, those excess earnings become a tax,⁴⁵ and the statutes

⁴² See *Angell v. Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950) which dealt with a tax on income. See also *Estell Realty, Inc. v. Mayfield Heights*, 176 Ohio St. 367, 199 N.E.2d 875 (1964), which dealt with a tax on admission charges.

⁴³ *East Ohio Gas Co. v. Akron*, 7 Ohio St. 2d 73, 76, 218 N.E.2d 608, 610 (1966), citing *Glander, Analysis and Critique of State Pre-emption of Municipal Excise and Income Taxes under Ohio Home Rule*, 21 OHIO STATE L.J. 343, 344 (1970):

In other words, the court held that it is not necessary for the purpose of limiting municipal taxing powers, that the General Assembly pass a 'thou shalt not' statute; it may as effectively achieve this result by implication, 'by invading the field on its own account.' It is this doctrine of pre-emption by implication, as distinguished from express interdiction, that has been both controversial and questionable in respect to municipal taxation in Ohio.

See the same article for other cases on this subject and a thorough analysis of the area.

⁴⁴ OHIO REV. CODE ANN. § 5747.02, Am. Sub. H. B. 475 (1971) which provides in pertinent part:

The levy of this tax on income does not prevent a municipal corporation from levying a tax on income.

See also OHIO REV. CODE ANN. § 5733.06, Am. Sub. H. B. 475 (1971) which provides as to the corporate franchise tax:

The tax charged to corporations under this chapter for the privilege of engaging in business in this state, which is an excise tax levied on the value of the issued and outstanding shares of stock, shall in no manner be construed as prohibiting or otherwise limiting the powers of municipal corporations in this state to impose an income tax on the income of such corporations.

⁴⁵ *Franklin v. Harrison*, 171 Ohio St. 329, 170 N.E.2d 739 (1960). The opinion in this case

control the municipal corporation's use of those excess earnings. Therefore, so long as the municipal corporation is not realizing excessive earnings from the operation of a municipal utility, it has the power, under article XVIII, § 4, to use those utility earnings as it chooses; but once its earnings become excessive, the excess becomes a tax controlled by the statutes.

Together with the existence of the doctrine of pre-emption and the above noted constitutional authority, limitations imposed on the ability of Ohio municipal corporations to impose taxes may also be found in the statutes of Ohio as enacted by the General Assembly of the State.

V. CONCLUSION

Because of the existing constitutional provisions, the General Assembly of the State of Ohio has the ability to impose restrictions and limitations on the incurrence of debt and on the levy of taxes by an Ohio municipal corporation. Under the existing statutory structure, the General Assembly has given greater leeway in matters of incurrence of debt and imposition of taxes to a city whose charter contains a tax rate limitation, particularly if such tax rate limitation is in excess of the share mandated by Section 5705.31, Ohio Revised Code, for that municipal corporation.

reviews the several judicial decisions holding that surplus utility revenues are a tax and interprets two statutory sections to preclude levying a tax on the services of the utilities named in such sections.